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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 405

IN THE MATTER OF LEE ROY MURCHISON AND JOHN WHITE, PETITIONERS

BRIEF FOR STATE OF MICHIGAN, RESPONDENT

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I

Opinions Below

The opinions of the court below are officially and unofficially reported as

In re White, 340 Mich 140; 65 NW2d 296;
In re Murchison, 340 Mich 151; sub nom.
Appeal of Murchison, 65 NW2d 301.

The opinions in Murchison (R. 107) and White (R. 183) also appear in the transcript of record.

II

Jurisdiction

a. The opinions (R. 107, 183) and judgments (R.111) of the Michigan Supreme Court in these consolidated cases, were handed down and entered July 6, 1954 and a motion for rehearing (R. 191-192) was denied (R. 206) on the 8th day of September. We therefore agree that the petition for certiorari, filed October 14, 1954, was timely.

b. While it is true that Murchison by timely objections challenged the qualifications of the judge to hear charges of contempt growing out of a grand jury inquiry which he was conducting, it should be noted that such objections (R. 34-37, 84-87, 89, 90, 102, 104) were, with a few exceptions (R. 86, 87, 89, 90), predicated almost entirely upon what counsel termed (R. 102, 104) "the plain, unequivocal language" of the 1-man jury law, § 4 of which reads in part as follows:

> "Provided, That the judge conducting the inquiry under section 3 of this act shall be disqualified from . . . hearing any charge of contempt under section 5 hereof, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena."

Noting the renewal of such objections on appeal to the Michigan Supreme Court (R. 2-3), counsel state that the latter, in its Murchison opinion, 340 Mich. 151 (R. 107), "failed to pass upon petitioner's claims that the contempt hearing before the trial judge constituted a denial of due process of law as required by the Fourteenth Amendment."

Likewise, in White, 340 Mich. 140 (R. 183), counsel in-

timate that the high court of Michigan deliberately by-passed the federal issues raised as to due process.

If the Michigan Supreme Court in Murchison failed to decide these federal questions, and if in White they were not squarely met, it was because in the trial court, counsel laid great stress upon their claim that the judge was disqualified by legislative mandate from hearing such charges of contempt, and because in White they also contended that under the express terms of § 3 of the act, as well as the Due Process Clause, the witness was entitled to the presence of counsel when testifying in the grand jury room.

On this latter question, however, the court in coming to its conclusion on White's claim, and in construing the statutory provision on which his counsel relied, took into consideration that a witness before a grand jury is not on trial for any offense. Therefore, it held, "a witness legally called to testify before a grand jury is not entitled to have an attorney with him when he is so testifying" (R. 191).

In our brief opposing the petition for certiorari in this cause, we contended, pp. 10-14, that the Supreme Court of Michigan decided no federal question and, we presume, in granting the writ this Court set at rest the question of jurisdiction. Be that as it may, however, we do not intend to quibble over this phase of the controversy and it is our intention to discuss the constitutional questions implicit in petitioners' brief.

III

Constitutional Provisions and Statutes

1. The constitutional provisions involved in the case, are correctly published in petitioners' appendix.

2. The Michigan 1-Man Grand Jury Law, so called, is not a separate and distinct statute but comprises 8 sections of the Michigan Code of Criminal Procedure which are published in petitioners' appendix to their brief. The correct citation, however, is as follows:

> Michigan Code of Criminal Procedure, Chap. 7, §§ 3, 4, 4a, 5, 5a, 6, 6a and 6b, as last amended by Pub. Acts Mich. 1951, No. 276 [Comp. Laws Supp. 1952, §§ 767.3-767.6 (b) (Mich. Stat. Ann.—Henderson—1954 Rev. §§ 28.943-28.946 (2))].

3. Although the word is frequently used in connection with this law, the 1-man grand jury procedure does not lead to an "indictment" and immediate trial but merely culminates in the issuance of a warrant authorizing the apprehension of an accused person in order that he may be brought before a magistrate for a preliminary examination to determine whether an offense not cognizable by a justice of the peace has been committed and there is probable cause for charging the defendant therewith. If the magistrate so finds, he "shall forthwith bind such defendant to appear before" a court of competent jurisdiction for trial.

We therefore publish as Appendix A, a true copy of §§ 1-5, incl., and § 13 of Chapter 6 of the Michigan Code of Criminal Procedure, captioned "Examination of Offenders" [Comp. Laws 1948, §§ 766.1-766.5 and 766.13 (Stat. Ann. 1954 Rev. §§ 28.919-28.923 and 28.931)].

4. It is also essential to a clear understanding of Michigan's criminal procedure, to note that the recorder's court of the city of Detroit operates under a local act of the legislature enacted in 1883,[1] which continued the office of recorder and recorder's court to have original and exclusive jurisdiction of all prosecutions and proceedings for crimes, misdemeanors and offenses arising under the laws of the state and committed within the corporate limits of the city of Detroit, except "in cases cognizable by the police court of the city of Detroit, or by the justices of the peace of said city."

Up to the year 1919, Detroit had two courts of criminal jurisdiction, the recorder's court, with jurisdiction over felonies, the old police court with jurisdiction over misdemeanors and possessing in its judges the powers of magistrates or justices of the peace.

In that year, however, the legislature passed "An Act to supplement existing laws providing for the establishment and maintenance of municipal courts of record and defining the jurisdiction of such courts" which, of course, included the recorder's court of the City of Detroit. Pursuant to this supplemental act, the police court of the city of Detroit was abolished, § 10, and all the powers, duties and jurisdiction thereof were thereafter performed by the recorder's court. Consequently, the duty of issuing warrants upon complaints, the hearing of misdemeanors, and the holding of preliminary examinations, passed from police judges and magistrates to the judges of the recorder's court.

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[1]

Act 326 of Local Acts 1883, "An Act to provide a charter for the City of Detroit. .." Chapter XII, Recorder's Court [Comp. Laws Mich. 1948, § 726.1 et seq. (Mich. Stat. Ann. § 27.3551 et seq.)].

We are therefore publishing as Appendix B a schedule of pertinent sections of the acts aforesaid.

In order that the Court may have a clear understanding of Michigan's criminal procedure under her "one-man grand jury system," so-called, we are republishing as Appendix C, a summary thereof, its history and purposes, which appeared as Appendix "A" in our brief in the Oliver Case (333 U.S. 257, No. 215 Oct. Term 1947).

IV

Questions Presented

1. During the proceedings which culminated in orders adjudging petitioners guilty of contempt of court committed as witnesses before a judge conducting a judicial inquiry pusuant to the Michigan 1-man grand jury law, so-called, was each accused person accorded that measure of due process required by the Fourteenth Amendment and consistent with this Court's opinion *In re Oliver*, 333 U.S. 257 (No. 215, December Term, 1947)?

2. Is a judge of the recorder's court of the city of Detroit who is conducting a judicial investigation pursuant to the Michigan one man grand jury law, so-called, barred by the statute aforesaid as interpreted by the State's highest court, or by any concept of due process, from hearing charges against a witness for alleged contempt of said court?

3. When called upon to testify before a judge conducting such a judicial inquiry, is a witness entitled under the Sixth or Fourteenth Amendment "to have the assistance of counsel" in the court room where such proceedings are held, it appearing that under the provisions of § 3 of the

act, as construed by the Michigan Supreme Court, the legislature intended that a witness was entitled to legal counsel before or after being subpoenaed and prior to being called as a witness, or at such other times in the discretion of the judge?

V

Statement of the Case

In the Matter of John White:

Pursuant to Revised Rule 40, § 3, we point out the following omissions in petitioners' statement of the case:

1. We feel compelled to substitute the following for petitioner's account of the genesis of the grand jury inquiry, brief, p. 5:

During examination of a police officer as a witness in open court during the public hearing of contempt charges against White, it was stipulated between court and counsel (R. 71-72) that as a result of a raid upon certain premises located at 945 St. Josephats Court in the city of Detroit on March 15, 1954, gambling paraphernalia was seized, and a warrant was issued charging a conspiracy to violate the gambling laws. At the time of hearing the contempt charges, those so accused were awaiting trial.

Because of the nature of certain persons who were seen frequenting the place, there was a well-founded suspicion, "that there was an agreement between certain police of-

ficers and someone who was violating the law to violate the law."[21]

The fact that policemen were observed by officers of that department, going to the doors, in some cases going inside 945 St. Josephats Court, gave rise to the belief that the gambling operations conducted there were being conducted unmolested because the police who should have been interfering were being paid not to do so (R. 72).

For these reasons it followed that on the 16th day of March, 1954, the prosecuting attorney of Wayne County filed in the recorder's court of the city of Detroit a petition requesting "a judicial investigation into the operations of numbers syndicates and the relation of certain police officers therewith" (R. 133). The application was considered by the entire bench of the recorder's court and Judge O'Hara was selected to conduct the investigation. He proceeded so to do.

2. We should also add to counsel's statement, brief, p. 5, that the witness White not only declined to answer any questions unless his attorney was with him at all times, from the beginning to end (R. 138-142), but also refused, on like grounds, to state the name of his attorney (R. 140), whether his counsel had accompanied him to court that morning (R. 142), whether such attorney was outside in the hall, whether he had conferred with counsel before coming to court that morning, or to reveal the name of the attorney whose presence he desired in the court room. He gave no reason for refusing to answer this latter question (R. 142-143).

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[21] This paragraph is couched in the commendably frank language of defense counsel who joined in the stipulation.

3. Another fact omitted from counsel's statement is that although the witness White was asked (R. 141) whether he had ever engaged in the numbers business, whether he had ever given any members of the Detroit police department any money, gift, or gratuity, or anything of value to influence their judgment or decisions, and like questions (R. 142), he claimed no privilege against self-incrimination either under the 5th Amendment or Article II, § 16 of the Michigan State Constitution.

4. It is also permissible to note that while the formal order (R.136) issued in White, required the witness to show cause why he should not be punished for criminal contempt of court, the judge interpreted its language as commanding the witness to show cause why he should not be adjudged guilty of contempt (R. 145, 146) and, after a hearing in open court, he adjudged the respondent guilty of that offense and having done so, pronounced sentence (R. 177).

5. Nor should it be overlooked that the hearings in the matter of White on May 24 (R. 181) and May 28, 1954 (R. 145) were held in open court. The doors of the court room were open and anyone who desired to come into the court room was privileged to do so. Petitioner was represented by counsel, and the press was also present in addition to other people (R. 181)

In the Matter of Murchison:

1. Here, as in White, although the witness was ordered (R. 7-8) to show cause why he should not be punished for contempt of court, both court (R. 31) and counsel (R. 84) interpreted its language to mean that the witness was required to "show cause why he should not be adjudged in contempt of the court for giving false answers to certain questions which were propounded to him in the grand jury

investigation." The quoted language (R. 84) is that of defense counsel.

2. The contempt hearings, as in White, were held in open court. The front door of the court room was opened wide so that any person desiring to attend could do so. At various times many attorneys and other persons were present in the court room, including representatives of the press (R. 31, 38).

3. At the outset of the hearing in Murchison, before testimony was taken, counsel challenged the right of the judge to proceed in the matter because of a prohibition in the statute, "because of the provisions of the statute regulating procedure and hearings of this nature" (R. 37). The court ruled that testimony would first be taken and legal arguments heard thereafter (R. 34-35).

Following testimony so taken on the 10th day of May, 1954 (R. 39-76), counsel requested (R. 76-82) and obtained an adjournment to May 12, in order that he might attempt to show through witnesses that on the 9th day of March the respondent Murchison was not in the city of Detroit but that he was at Shrewsbury, Ontario, Canada, although he hadn't been able to get the witnesses to substantiate his claim up to the present time. As soon as counsel had definite information, he would transmit it to the assistant prosecuting attorney (R. 77).

On May 12, when court reconvened (R. 83), counsel for Murchison stated that his client elected not to offer any testimony whatsoever. Legal arguments being invited by the court (R. 85), counsel raised the points specified in his statement. Adjournment was then had to the 14th day of May (R. 91) when further testimony was taken (R. 92-101).

Defense counsel then announced (R. 101-102) he had no testimony to offer and he wished to reiterate Murchison's position "that a person should be able to rely upon the plain, unequivocal language of the statute of his state," and he protested "these entire proceedings as being in violation of the law in such cases made and provided" (R. 102).

We would also add the undisputed fact that Murchison was a patrolman and member of the Detroit police department.

VI

Summary of Argument

1. Each petitioner when charged with a contempt of court alleged to have been committed as a witness during a judicial inquiry conducted by a judge of the recorder's court of the city of Detroit pursuant to the Michigan 1-man grand jury law, so-called, was accorded that full measure of due process consistent with this Court's opinion *In re Oliver*, 333 U.S. 257:[31]

a. He was advised of the charges against him.

b. He had a reasonable opportunity to meet them by way of defense or explanation.

c. He had the right to and was represented by able counsel who appeared at the hearing to cross-examine witnesses.

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[31] Cf. Courtney et al. v. Schroeder, 348 U.S. 933 [No. 179, October Term 1954.]

d. He had a chance to testify and call other witnesses in his behalf, either by way of defense or explanation.

e. He had a hearing in open court.

2. In conducting an inquiry pursuant to said law, a judge is acting in a judicial capacity as conservator of the peace or magistrate with authority, when justified, to issue warrants of arrest, and he is neither a police officer, a detective, nor a prosecuting attorney, and he has no power to indict.[4]

No valid provision of the statute, as construed and viewed by the State's highest court, can operate to deprive such a judicial officer of inherent power to punish for contempt of court committed in his presence.

Moreover, in White, the judge was called upon to decide a question of law rather than fact,[5] while in Murchison, counsel filed no affidavit of prejudice nor did he claim at any time during the hearing in open court that the judge had actually prejudged the factual issues presented.[6] And, after offering so to do, counsel later refused to produce witnesses or place Murchison on the stand.

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[4]

The highest court of the state has so construed the statute in view of Michigan's State Constitution, In re Slattery, 310 Mich. 458, cert. den., 325 U.S. 876.

[5]

The question in White was whether he was entitled to the aid of counsel when testifying as a witness.

[6]

Counsel relied in the main upon provisions of the statute (R. 37) rather than upon any claim of actual prejudice.

It therefore follows (a) that the Michigan 1-man grand jury law, as here applied, does not delegate to a judicial officer, power to exercise legislative, administrative or executive power, nor does it vest in a member of the executive department, authority to exert judicial powers, contrary to Article IV of the Michigan Constitution 1908; nor is this a federal question; and (b) that the law aforesaid, as here applied, violates no concept of due process assured by the Fourteenth Amendment.

3. Petitioner White, when called upon to testify as a witness before a judge conducting an inquiry pursuant to the Michigan 1-man grand jury law, so-called, was not entitled to have the assistance of counsel in the court room during the taking of his testimony:

a. The "assistance of counsel for his defence," as that phrase is used in the 6th Amendment, is deemed by this Court to be a right essential to that fair hearing which under the Federal Constitution, must be accorded one accused of a criminal offense,

DeMeerleer v. Michigan, 329 U.S. 660.

Such constitutional provisions were adopted for the purpose of abrogating the common-law practice under which persons accused of felony were denied such right, *Powell v. Alabama*, 287 U.S. 45, which extends from arraignment to final argument, *Avery v. Alabama*, 308 U.S. 644, and beyond that to a habitual criminal accusation, *Chandler v. Fretag*, 348 U.S. 3.

b. So far as we can ascertain from careful research, it is well established that a mere witness is not entitled

to have the aid of counsel when testifying either at trial or before a grand jury.[7]

c. The witness White, petitioner here, was not called before the judge conducting the inquiry, as a person accused of a specific crime, later to be tried by a petit jury, and, when asked certain questions he failed to assert any privilege against self-incrimination. Moreover, although instructed by the judge that if there were any questions upon which he felt that he needed the advice of counsel, and it were done reasonably and not in such a way as to cause delays, he would be permitted to go out and talk to his attorney, he failed to exercise the privilege (R. 138-139).

VII

The Argument

Introductory

We would, at the outset, endeavor to clear up certain misapprehensions of Michigan's 1-man grand jury system, so-called, explicit in petitioners' "history" thereof, brief, (pp. 10-12):

1. Counsel state, p. 10, that "the effect of such legislation was to vest in a single individual (judges of courts of record, police judges and justices of the peace) the power to investigate crime and issue indictments as a result of such investigation. The effect of such legislation resulted in much litigation and attendant criticism."

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[7] Ex parte White, 47 F2d 543, per Judge Augustus N. Hand. And please examine Gilmore v. United States, 129 F2d 199, cert. den., 316 U.S. 661; and Ruber v. Welch, 159 F2d 493; cert. den., 331 U.S. 867.

a. The investigating jurist,[8] however, possesses no authority to issue indictments, and ultimate power conferred by the act is fully expended upon issuance of a warrant for the arrest of the accused. Following execution of such a warrant, the respondent is brought before a magistrate to be accorded a preliminary examination to determine whether a crime has been committed and whether there is probable cause to believe that the accused is guilty thereof; if the magistrate so finds, the defendant is then bound over for trial.[9]

b. Quoting the prevailing opinion of this Court in *Oli[illegible]* U.S. 257, 263, counsel note that secret interrogations can be carried on day or night, in a public place or a "hideout," a courthouse, an office building, a hotel room, a home, or a place of business; and that " 'so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the 'portable grand jury' ".

While in the administration of this law, abuses *may* have occurred on rare occasions in the past,[10] it is not true that in this particular case, secret interrogations were carried on night or day, in any place other than the official

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[8]

As amended by Pub. Acts Mich. 1951, No. 276, § 3 of the 1 man grand jury law vests such power in "any judge of a court of law and of record," not minor judicial officers.

[9]

Please see Appendix "A" and Appendix "C," post.

[10]

In Pickett v. Michigan, No. 319 Oct. Term 1954, now pending on application for certiorari, while the circuit judge conducted a "portable" investigation, such irregularities, or so we contend, were not reflected on the subsequent preliminary examination and trial.

court room of the investigating jurist. Indeed, the inference from the record is fair that witnesses were examined in the court room with full opportunity to consult counsel who congregated in the hallways (R. 138-139).

> c. Counsel further say, br., pp. 11-12, that in its decision the Michigan Supreme Court returns to the original idea of an investigating and executive official arriving at a purported judicial conclusion and pronouncement in camera, and that "the issuance of an order to show cause after a so-called judicial finding is a farcical attempt to pay homage to the Due Process Clause."

It is our position that the judge in the case at bar issued his order to show cause (R. 7, 136) merely for the purpose of fairly apprising the accused witnesses of the precise nature of the charges of contempt of court preferred against them, that he made no final judicial determination of their guilt, that he held no proceedings in camera on the issues of contempt, and that the word "punish," instead of the word "adjudge," has been exaggerated far beyond the judge's original intent.

Point One

Each petitioner, White and Murchison, was accorded due process consistent with In re Oliver, 337 U.S. 257, as distinguished from a recent Kansas Case.[11]

In *Oliver, supra*, after petitioner had given certain testi-

[11]

Courtney et al. v. Schroeder, 348 U.S. 923, where the judgment was reversed in contempt proceedings under the inquisitory law of Kansas, and the case remanded for proceedings not inconsistent with the opinion in Oliver.

mony, the circuit judge, acting in the belief that his testimony was false and evasive (which belief was based partly on testimony given by at least one other witness in petitioner's absence), summarily charged him with contempt, convicted him, and sentenced him to sixty days in jail. These proceedings were secret and petitioner had no opportunity to secure counsel, to prepare his defense, to cross-examine the other grand jury witness, or to summon witnesses to refute the charge against him.[12]

This Court held: (1) the secrecy of petitioner's trial for criminal contempt, and (2) the failure to afford petitioner a reasonable opportunity to defend himself against the charge of giving false and evasive testimony, was a denial of due process. As so clearly stated by Mr. Justice Black in the prevailing opinion, 348 U.S. at 272, in the case before the Court,

> "the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to prison—still without any break in the secrecy. Even in jail, according to undenied allegations, his lawyer was denied an opportunity to see and confer with him. And that was an end of the secrecy."

Unlike Oliver in the case from Michigan, or Courtney and others in the case from Kansas, 348 U.S. 933, the in-

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[12]
We paraphrase the basic headnote In re Oliver.

vestigation conducted by Judge O'Hara never became a trial in camera nor did Murchison or White become an accused until he had been cited into court on contempt charges. Moreover,

(1) each petitioner was advised of the charges against him (R. 7, 136).

Counsel, of course, noting the peculiar language of each order to show cause, point to this as our Achilles heel, but the orders, as drafted, become vulnerable only when overemphasis is placed upon the court's command that each witness "show cause why he should not be *punished* for criminal contempt of this court because of his aforesaid acts." And from such a premise, counsel argue that the investigating jurist prejudged the guilt of each petitioner, convicted him during a secret session, and thus deprived him of due process. While the precise language of the court's mandate is perhaps unfortunate, it nevertheless expresses the judge's true intent. As we view the record, the sole purpose of the order to show cause was to inform the petitioner, with scrupulous care, of the specific charges of contempt preferred against him. Certainly it was not the purpose or intent of the judge to find the accused guilty of contempt, then bring him in to admeasure punishment.

In the case of White, the only question presented was one of law: whether he was entitled to the aid of counsel in the court room. In the case of Murchison, issues of fact were involved and the accused was afforded every possible opportunity to aid the court in resolving them in his favor. But his counsel failed to call his client to the stand and, after offering to produce such alibi witnesses as might be available (R. 76-82), and having obtained a continuance for that express purpose, he bluntly refused, on the adjourned date, to adduce any testimony whatsoever (R. 83).

Nor can we find any positive statement from defense counsel to the effect that they considered the judge to be disqualified because of actual prejudice on his part and, so far as we can ascertain, any claim that he was disqualified to hear the charges of contempt, was based primarily upon the provisions of the 1-man grand jury law itself (R. 37, 101, 102).

Moreover, when the case of Murchison was called for hearing, the judge stated (R. 31), without contradiction from defense counsel, that the matter then before the court had been brought in by an order to show cause why Murchison "should not be *adjudged* guilty of criminal contempt for giving false answers to questions asked of him . . .". And on the occasion of an adjourned hearing, held May 12, 1954 (R. 83), defense counsel himself gave a similar interpretation of the order to show cause.[13] And in the matter of White, when called for hearing, the court in the presence of defense counsel twice asserted (R. 145-146) that he had before him the order requiring White to show cause "why he should not be adjudged guilty of contempt of court," in which statement it is quite apparent, counsel acquiesced for he immediately stipulated (R. 146) that a complete transcript of the testimony of White might be received in evidence as an exhibit.[14]

And finally, while on this subject, it might be noted that while in cases of contempt due process requires "that the

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[13]

Counsel stated (R. 84) that the order directed to respondent Murchison commanded that he appear "and show cause why he should not be adjudged in contempt of the court."

[14]

Although this was the point at which to object to the wording of the order to show cause, counsel let the opportunity go by without disputing the judge's interpretation thereof.

accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation,"[15] this is not to say that the proceedings must take any particular form so long as the substantial rights of the accused are preserved."[16]

(2) Following the essentials of due process specified in Oliver, supra, each petitioner also had reasonable opportunity to meet such charges by way of defense or explanation; he had the right to engage counsel and he was represented by lawyers of high standing at the bar, who appeared at the hearings, argued points of law, and, in the case of Murchison, subjected witnesses to rigorous cross-examination.

(3) Murchison, of course, had a chance to testify and call other witnesses, but, as we have seen, he chose to forego that privilege, failed to take the stand in his own behalf, and neglected to produce other witnesses. Hence, it follows that the testimony of police officers who said they saw him at the place of gambling activities, remained undisputed and consequently the judge had no testimony to weigh.

(4) It also lies beyond the peradventure of a doubt that

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[15]

Chief Justice Taft in Cooke v. United States, 267 U.S. 517, 537.

[16]

Camarota v. United States, 111 F2d 243; 38 A.L.R. 2d 239, note; certiorari den., 311 U.S. 651. Citing inter alia, Ex Parte Savin, 131 U.S. 267, where it is said (probably obiter dictum) that in cases of misbehavior of which the judge cannot have personal knowledge and is informed thereof only by the confession of the party, or by the testimony under oath of others, "the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. 4 Blk. Comm. 286."

all hearings on such contempt charges were held in open court, both public and press being admitted (R. 31, 38, 181).

In the recent cause of *Courtney et al. v. Lockett*, No. 179 October Term, 1954, 348 U.S. 933, witnesses subpoenaed to testify at a secret inquisition proceeding held under the laws of Kansas, were accused of direct contempt of court and tried, sentenced and committed to jail without interruption of the secrecy. Three days after oral argument, this Court reversed the judgment and remanded the case "for proceedings not inconsistent with the opinion of this Court *In re Oliver* . . . "

We respectfully submit that since the petitioners in the pending cause were fully informed of the charges against them, had counsel, and their day in open court, the proceedings which led to their conviction were consistent with *Oliver* and it cannot be said that they were denied due process of law.

Point Two

The Michigan 1-man grand jury law, so-called, as here applied, violates no concept of due process.

Article IV of the Michigan State Constitution, § 1, divides the powers of government into the traditional 3 departments, legislative, executive and judicial, and provides, § 2, that no person belonging to 1 department shall exercise the powers properly belonging to another.

Petitioners contend that in acting as a grand juror, the judge was acting in an administrative and/or executive capacity, and that to combine these functions is in derogation of the constitutional provisions aforesaid. And it is said that whenever the question has been presented as to

whether a grand jury inquiry is a judicial one, the courts have answered in the negative.

The first trouble with such an argument, of course, when addressed to this Court, cannot be based upon the Federal Constitution but is a problem controlled by state law.

Dryer v. Illinois, 187 US 71, 84;

Crowell v. Benson, 285 US 22, 57;

Highland Farms Dairy v. Agnew, 300 US 608, 612.

Moreover, the highest court of the State has held,

In re Slattery, 310 Mich 458; cert. den., 325 US 876,

that a grand juror proceeding under this act is a judicial officer, not a prosecuting attorney, policeman or detective, and that the statute in question does no violence to Article IV of the State Constitution.

The Michigan statute, in operation, is not subject to the condemnation of Judge Cardozo leveled upon the proceedings involved

In re Richardson, 247 N.Y. 401.

As noted in the opinion written by Mr. Justice Butzel In the case of *Slattery, supra,*

> "The sole issue in the *Richardson Case* was whether a New York statute which provided that the governor of New York, in a proceeding before him for the removal of a public officer, might as governor take the evidence, or at his option direct that the taking of proofs be delegated to a judicial officer or commissioner for the purpose of taking testimony and reporting his findings to the governor. The law was held

to be unconstitutional on the ground that it was a delegation of the administrative powers to the judiciary."

This rule cannot be applied to Michigan's 1-man grand jury proceeding, however, for under that act as under the Federal system, the proceeding before a grand jury constitutes a judicial proceeding, *Cobbledick v. United States*, 309 U.S. 323.

Furthermore, under Michigan's system, justices of the peace, circuit judges and justices of the Supreme Court are deemed conservators of the peace within their respective jurisdictions. Const. Mich. 1908, Article VII, § 18.

Petitioners here, as did counsel in *Slattery, supra*, probably claim that the office of conservator of the peace is a different position from that of a judicial officer. But the Michigan Supreme Court in the case of *Slattery* set the question at rest, 310 Mich. at 466. And it should be observed that Judge Cardozo *In re Richardson*, 247 N.Y. at 412, pointed out by way of analogy that a magistrate before whom there is laid an information of the commission of a crime, conducts a *judicial inquiry* when after finding that a crime has been committed, and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest.

Counsel in their zeal intimate that the judge who conducted the hearings on contempt charges had prejudged the case and made a predisposition. There is not the slightest foundation for such an accusation,[17] nor do the cases cited sustain counsel's position which seems to be that Judge O'Hara should have transferred the cause to

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[17]

Counsel's charge of judicial prejudice is based almost entirely upon the language of the order to show cause heretofore discussed.

another judge of the same court. But this Court has applied such a rule or precept only in exercise of its supervisory authority over the administration of criminal justice in the federal courts, and then only when an accused's conduct cannot fairly be considered apart from that of the trial judge, or where the issue between the judge and the parties has come to involve marked personal feeling that does not make for an impartial and calm judicial consideration and conclusion,

Cooke v. United States, 267 U.S. 517, 530;

Offutt v. United States, 348 U.S. 11.

We respectfully submit that the law of Michigan, as here applied, violates no concept of due process.

Point Three

Neither the statute here in question, as judicially construed, nor the Due Process Clause viewed in the light of the Sixth Amendment, accorded White the right to the presence of counsel when testifying as a witness in the court room of the judge.

In our summary of the argument we have cited a few outstanding decisions to support our position that one is not entitled as of right to the presence of counsel when testifying as a witness rather than as an accused person, either at a trial of another or before a grand jury. This, we have noted, becomes clearly apparent in the light of the express language of the Sixth Amendment and its history.

Counsel for White contend, in the first place, that the Michigan Supreme Court distorted the language of the 1-man grand jury law, § 3, by giving its unambiguous

language an unjustifiable interpretation when it held, 340 Mich. at 150, that it meant "that a witness might consult with legal counsel, but (it) did not intend that a witness had the right to have his lawyer sit in the courtroom while the witness was testifying."

The proviso of the section of the law on which petitioner relies, reads as follows:

> "Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt."

In coming to its conclusion upon this issue the court took into consideration that a witness before a grand jury is not on trial for any offense, and it did not think that the legislature intended that a witness not on trial for any offense was entitled to have "an attorney at his elbow to advise him whether or not he should answer a question put to him." It was concluded that the legislature intended that a witness was entitled to have legal counsel before and after being subpoenaed and prior to his being called as a witness, or at such other times in the discretion of the grand juror.

This Court has said, *Greenough v. Tax Commission*, 331 U.S. 486, at 497:

> "State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final authority upon the meaning of their state law. It is only in circumstances where their judgments collide

with rights secured by the Federal Constitution that we have power to protect or enforce the federal right."

We respectfully submit that in the present circumstances it cannot be said that Michigan's interpretation of its own law collides with rights secured by the Federal Constitution, *viz.*, the right to the assistance of counsel for the defence of an accused person, Sixth Amendment, or such kindred right as may be secured by the Due Process Clause of the Fourteenth.

Counsel seem to concede that if White were merely a witness before the grand juror, he might not be entitled to the presence of his counsel in the court room. But, they urge, since the grand jury was established for the purpose of investigating the operation of numbers syndicates, and since White when called as a witness was specifically interrogated "in a manner definitely directed to establishing his criminal connections with the offense involved," he was immediately placed in the position of a potential defendant "and as such a potential defendant he was entitled to the benefit of the constitutional guarantees of due process," including the right to counsel. And they cite among others the following decisions said to support them in their position:

Powell v. Alabama, 287 U.S. 45, 68, 70;

People v. Bermel, 71 NY Misc. 356; 26 NY Cr. 47;

People v. Mondon, 103 N.Y. 211; 8 N.E. 496.

Decision in the case of *Powell, supra,* like those in many others to follow,[18] was predicated on the proposition

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[18] E.g., Betts v. Brady, 316 U.S. 455, 466; House v. Mayo, 324 U.S. 42, 46; DeMeerleer v. Michigan, 329 U.S. 660; and, the latest expression of the rule, Chandler v. Fretag, 348 U.S. 3.

that the constitutional right of an accused to be heard, includes the right to be heard by counsel *when charged with crime.*

The case of *Bermel, supra,* is readily distinguished from the case at bar. There a defendant in a criminal action was subpoenaed and compelled to be a witness against himself before the grand jury which indicted him for perjury in having previously sworn falsely before another grand jury. It was held that his constitutional rights were invaded and the indictment must be dismissed, but with direction that the charge of perjury be submitted to another grand jury. And the court, pointing a distinction, stated that if the person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, whereas, if he be in fact the party proceeded against, he cannot be subpoenaed and sworn even though he claim no privilege.

In *People v. Mondon, supra,* 103 N.Y. 211, 8 N.E. 486, a conviction of murder in the first degree was reversed for error in the introduction in evidence of statements made by the accused, an ignorant Italian laborer, at a coroner's inquest shortly after his arrest as the suspected murderer.

The distinction is perfectly obvious for in the case of *White* the witness was not charged with a crime and when called to the stand he did not immediately step into the role of an accused person. Even before any pertinent questions were asked, he took the firm position that he would not under any circumstances answer questions until his counsel was present in the court room. He knew, or should have known, that he would be entitled to immunity from prosecution if he claimed his privilege against self-incrimination. The fair inference is that his counsel was as a matter of fact within reach in the corridor of the court

and he was given the chance to consult him if he so desired. He not only declined to answer any questions unless his attorney was present in the court room; he also refused to state whether his counsel had accompanied him to court that morning or whether his attorney was "outside in the hall," or whether he had conferred with an attorney before coming to court, and he further declined to name the lawyer whose presence he desired. In short, this witness was guilty of bad faith throughout his entire examination.

In contending that White was entitled to counsel, a point is raised, brief, p. 22, which was not clearly presented in the trial court or on appeal, so far as we have been able to ascertain. Of course, as counsel state, to constitute contempt through perjury, it must also appear that the false testimony of the witness obstructed the administration of justice. The answer is, however, that both White and Murchison obstructed the grand jury proceedings, Murchison by giving false testimony, White by refusing to answer any questions.

VIII

Conclusion

For the reasons assigned in this brief, we respectfully submit that the final judgments of the Michigan Supreme Court should be affirmed.

Respectfully Submitted,

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